A **ONG BOON HUA @ CHIN PENG & ANOR**

v.

KERAJAAN MALAYSIA

B HIGH COURT MALAYA, KUALA LUMPUR
BALIA YUSOH WAHI J
[CIVIL SUIT NO: S4-21-294-2005]
10 DECEMBER 2009

C ***CIVIL PROCEDURE:*** *Striking out - Application for - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d) - Action on defamation - Whether words alleged against plaintiffs defamatory - Capacity of plaintiffs to bring action - Whether misconceived - Whether plaintiffs' claim unsustainable and disclosed no reasonable cause of action*

D This was an application by the defendant to strike out the plaintiff's action under O. 18 r. 19(1)(a), (b) or (d) of the Rules of the High Court 1980. The first and second plaintiffs were the same person. The first plaintiff was bringing the suit in his own capacity as well as a representative of all members of the Parti E Komunis Malaya and all other related parties. As the second plaintiff, he was suing in his capacity as the Secretary General of the Parti Komunis Malaya. By an 'Agreement between the Government of Malaysia and the Communist Party of Malaya to Terminate Hostilities' dated 2 December 1989 and 'Administrative F Agreement between the Government of Malaysia and the Communist Party of Malaya pursuant to the Agreement to Terminate Hostilities' dated 2 December 1989, the plaintiffs and the defendant have agreed to, *inter alia*, cease all armed activities forthwith. In consideration for the second plaintiff agreeing to G cease all armed activities, it was agreed that, *inter alia*, press statements issued by either the defendant or the second plaintiff thereafter should be in the spirit of the agreement and not contain any slanderous terms. It was the plaintiff's claim that two H newspaper articles which were published in the 'Star' on 21 March 2005 and 'The Sun' on 6 May 2005 had published words stating that the plaintiffs had committed a criminal offence punishable by imprisonment and in consequence of which the plaintiffs have been gravely injured in their character, credit and I reputation and have been brought into public scandal, odium and contempt. The plaintiffs submitted that it was their right to prevent the defendant from further slandering their names and that this was not a traditional or ordinary case of defamation based on

the law of tort. The issues that arose were (i) whether the claim by the plaintiff was groundless by any reason of flaw or fault in law; (ii) whether it was untenable because the allegations contained in the statement of claim were so implausible and illogical as to disclose no cause of action and (iii) the issue of the capacity of the plaintiffs to bring this action.

Held (allowing defendant's application):

(1) In the statement of claim, the plaintiffs were alleging slanderous statements being made by the defendant. The plaintiffs' action on the breach of the agreement and/or the administrative agreement arose out of the publication of the slanderous statements. The plaintiffs' action was therefore one based on defamation. However, the words alleged against the plaintiffs were not defamatory. It was a historical fact. The atrocities of the Parti Komunis Malaya was part and parcel of the history of the nation. This court was entitled to take judicial notice of this historical fact. Every responsible citizen of this country would know that and know who was the first plaintiff and what he was and what he had done to the country. The publications made by the defendant were not defamatory to the plaintiffs. The plaintiffs' claim was clearly unsustainable. It disclosed no reasonable cause of action. (paras 15 & 16)

(2) The plaintiffs' pleading indicated that the first plaintiff was suing in his personal capacity as well as a representative of all members of the Parti Komunis Malaya and all the other relevant parties. It was unclear who these 'other relevant parties' were. This was an unknown party. He was also suing in his capacity as the secretary general of the Parti Komunis Malaya. Defamation involves a right *in personam* and close relationship with the person defamed alone would not give rise to the right on the part of other persons to sue the defendant *Daya v. Param Sukh* and *Brahmana v. Ramakrishnama.* The first plaintiff's attempt of bringing this action as a representative of all members of the Parti Komunis Malaya and all other relevant parties was therefore misconceived. (paras 21 & 22)

(3) As to the *locus* of the second plaintiff suing as the secretary general of Parti Komunis Malaya, it is trite that an unincorporated association such as the Parti Komunis Malaya must be clothed with authority before it could be considered

A as a body with legal personality capable of suing and to be sued in its own name either in contract or in tort, which included of course, an action of defamation. Parti Komunis Malaya is an unlawful society. It is not a society registered under s. 7 of the Societies Act 1966. The second plainiff
B could only sue in that capacity if and only if s. 9(c) of the same Act had been complied with. There was no evidence to show that the second plaintiff had been so declared by the Registrar of Societies. In the circumstances, the second plaintiff lacked capacity. (para 23)

C **(4)** The statement of claim should be struck out. This was a plain and obvious case that the statement of claim as it stood was insufficient to entitle the plaintiffs to the reliefs claimed. (para 24)

D **Case(s) referred to:**

Atip Ali v. Josephine Doris Nunis & Anor [1986] 1 CLJ 320; [1986] CLJ (Rep) 283 HC ***(refd)***

Attorney-General, Malaysia v. Chiow Thiam Guan [1983] 1 CLJ 27; [1983] CLJ (Rep) 462 HC ***(refd)***

E *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC* ***(refd)***

Brahmana v. Ramakrishnama [1894] 1 LR 18 ***(refd)***

Chen Cheng & Anor v. Central Christian Church and Another Appeal [1996] 1 SLR 313 ***(refd)***

Daya v. Param Sukh [1888] 1 LR 11 All 104 ***(refd)***

F *Electrical, Electronic, Telecommunication and Plumbing Union v. Times Newspapers Ltd & Others [1980] 1 QB 585* ***(refd)***

Golden Century Development Sdn Bhd & Anor v. Gan Hoe & Anor [1982] CLJ 536; [1982] CLJ (Rep) 106 FC ***(refd)***

Knupffer v. London Express Newspaper Ltd [1944] AC 116 ***(refd)***

G *Sim Kie Chon v. Superitendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC* ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 rr. 19(1)(a), (b), (d)

Societies Act 1966, ss. 7, 9(c)

H *For the plaintiffs - Tommy Thomas, Raja Aziz Addruse & Chan Kok Keong & Leong Cheok Keng; M/s Leong & Tan*

For the defendant - Amarjeet Singh (Wan Roslan Wan Ismail with him) SFC

I *Reported by Suhainah Wahiduddin*

JUDGMENT

Balia Yusoh Wahi J:

[1] Enclosure 21 is an application by the defendant to strike out the plaintiff's action under O. 18 r. 19(1)(a), (b) or (d) of the Rules of the High Court 1980. The affidavit in support is in encl. 21A while the affidavit in reply by the plaintiff is in encl. 18.

Brief Facts Of The Case

[2] The first and the second plaintiffs are the same person. As the first plaintiff he is bringing the suit in his own capacity as well as a representative of all members of the Parti Komunis Malaya and all other related parties. As the second plaintiff, he is suing in his capacity as the Secretary General of the Parti Komunis Malaya.

[3] By an "Agreement between the Government of Malaysia and the Communist Party of Malaya to Terminate Hostilities" dated 2 December 1989 and "Administrative Arrangement between the Government of Malaysia and the Communist Party of Malaya pursuant to the Agreement to Terminate Hostilities" dated 2 December 1989, the plaintiffs and the defendant have agreed to, *inter alia*, cease all armed activities forthwith.

[4] In consideration for the 2nd plaintiff agreeing to cease all armed activities, the defendant shall assist members of the 2nd plaintiff in order to help them to start their peaceful life afresh. Further, in consideration for the 2nd plaintiff agreeing to terminate all armed activities, it was also agreed that:

(a) all press statements issued by either the defendant or the 2nd plaintiff thereafter shall be in the spirit of the agreement and shall not contain any slanderous terms; and

(b) the defendant shall not apply the Internal Security Act 1960 or any other laws on members of the 2nd plaintiff who have returned to settle down in Malaysia.

[5] Prior to entering into the agreement and the arrangement, there had been five rounds of Tripartite Peace Talks participated by the 2nd plaintiff, the defendant and the Thai government representatives.

[6] At the Tripartite Peace Talks, there had been undertakings, pledges and/or personal assurances made by the delegates of the defendant to the plaintiffs that "there would be no mention of surrender but it would be on the theme let the past be the past" and any press release by the Malaysian Government would be played down and there would be no embarrassing statements made against the Communist Party of Malaya.

[7] In a newspaper article which appeared in the "Star" on 21 March 2005, the defendant through its Deputy Information Minister, Datuk Zainuddin Maidin stated that it intends to televise short films on "the bloody insurgency, which left thousands of security personnel, civilians and communists dead".

[8] In a newspaper article which appeared in "The Sun" dated 6 May 2005, the defendant through the same Deputy Information Minister, Datuk Zainuddin Maidin stated that the Information Ministry is working with the Malaysia ex-Army Association to produce a special segment on the brutality of the Communist Terrorists.

[9] As this juncture, it is necessary to reproduce the said two articles which are as follows:

> The article in the "Star".
>
> "Chin Peng not easily forgotten or forgiven"
>
> Kuala Lumpur: Retired army major Zainal Omar, 72 describes his reaction to learning that exiled communist leader Chin Peng has launched a last ditch legal battle to return to Malaysia.
>
> "I wept when I read the news," he says, reflecting the mood among former soldiers who lost their colleagues in the communist insurgency of the 1940s and 1950s.
>
> He has not forgiven the communists who killed his father, uncle and seven other family members.
>
> He has vowed to round up former soldiers to picket the Penang High Court when Chin Peng's application is heard. The court date has not been fixed yet.
>
> The response was similar when the Malaysian authorities refused to let Chin Peng return in 2003 to launch his memoirs and visit the graves of his family members.

This new resort to the courts, made also on behalf of 300 to 500 former communists who want to return, is his last chance at permission to enter Malaysia. A

But the reaction of retired soldiers and Malaysians who remember the Emergency years says all is not forgiven.

Born Ong Boon in Sitiawan, Perak, the son of migrants from China's Fujian province, Chin Peng gained notoriety for leading the armed insurgency against the British and Malayan governments during the Emergency years from 1948 to 1960. B

He was secretaty-general of the Communist Party of Malaya (CPM) for 42 years until a peace accord was signed between the communists and the Government in 1989. C

Now 81 and living in Thailand, he is also banned from entering Singapore but was given permission for a three-day visit last October to speak at the Institute of South-East Asian Studies. D

Soon after his court application was filed last Friday, the Government announced plans to air a series of TV documentaries on the bloody insurgency, which left thousands of security personnel, civilians and communists dead. E

The short films, made by RTM, will be aired in the run-up to National Day on Aug 31.

Deputy Information Minister Zainuddin Maidin said the series had been planned earlier and was not reaction to Chin Peng's court case. F

Chin Peng's legal bid to return rests on the 1989 peace accord, allowing former CPM members to return if they applied within a year.

He missed that deadline but his lawyer, Darshan Singh Khaira, felt his client had a good case to be allowed home as a citizen and the ongoing debate had been unfair. G

"Chin Peng is entitled to due process of law, justice and fairness," he said – The Straits Times/Asian News Network. H

The article in the "Sun".

"Some out to make CTs look good"

Kuala Lumpur: Some quarters in the country are wrongly trying to make the communist terrorists look good, Deputy Information Minister Datuk Zainuddin Maidin said yesterday. I

A "One of the ways is by publishing books to revere former CTs as so called heroes," he said after receiving a visit by seven members of the Malaysia Ex-Army Association at his office here.

The association is working with the ministry to produce a special segments on the brutality of the CTs for Warta RTM. It will be
B aired daily for a month from Aug. 1.

Zainuddin said the segment was to instill awareness among the younger generation on the danger of the communist ideology to the country - Bernama.

C **[10]** The plaintiffs claim that by the words published in the above two articles it means that the plaintiffs had committed a criminal offence punishable by imprisonment and in consequence of which the plaintiffs have been gravely injured in their character, credit and reputation and have been brought into public scandal, odium
D and contempt. The said articles also created a substantial risk to the course of justice in the plaintiffs' action against the defendant in Originating Summons No. 24-298-2005 at the High Court in Penang.

E The reliefs sought by the plaintiffs are as follows:

a) a declaration that the "agreement between the Government of Malaysia and the Communist Party of Malaya to Terminate Hostilities" dated 2 December 1989 and the "Administrative
F Arrangement between the Government of Malaysia and the Communist Party of Malaya pursuant to the Agreement to Terminate Hostilities" dated 2 December 1989 and the said undertakings, pledges and/or personal assurances are valid, enforceable and binding on the defendant;

G b) damages *in lieu* of or in addition to the declaration;

c) damages to be assessed.

d) an injunction restraining the defendant by itself, its agent, and/
H or servants or otherwise, from further publishing the said or any similar slanders upon the plaintiffs or any other statements made in breach of the agreement and/or the arrangement;

e) Interest on the damages awarded;

I f) costs.

g) such further or other reliefs which this Honorable Court deems fit or proper.

The grounds of the defendant's application are as follows:

a) The plaintiff has no *locus standi* to bring this suit.

b) Class action does not apply in this case.

c) The second plaintiff has no legal personality who can be slandered.

d) The words published were not defamatory and does not refer to any individual.

e) The plaintiffs action is against the right to freedom of expression.

f) There is no breach of the agreement between the plaintiff and the defendant.

The Plaintiffs' Contention

[11] The plaintiffs in their affidavit in reply state that their action is about their right to prevent the defendant from further slandering their names which the defendant has agreed through the agreement. They claim that this is not a traditional or ordinary case of defamation based on the law of tort and that they have the capacity to bring the action. The plaintiffs submit that there ought to be a full trial of the matter.

Findings Of The Court

[12] The principles governing an application under O. 18 r. 19 has been succintly set out by Mohamed Dzaiddin SCJ in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 as follows:

> The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v. L & NW Rly Co*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors*). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on

A the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari material* with our O. 33 r. 2 of the RHC) (see *Hubbuck & Sons Ltd v. Wildinson, Heywood & Clark Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

B

[13] A similar principle has been applied in the earlier cases of *Sim Kie Chon v. Supritendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 and *Golden Century Development Sdn. Bhd & Anor v. Gan Hoe & Anor* [1982] CLJ 536; [1982] CLJ C (Rep) 106.

In *Golden Century Development Sdn Bhd & Anor v. Gan Hoe & Anor* [1982] CLJ 536; [1982] CLJ (Rep) 106 Wan Suleiman FJ expressed the following:

D

> We think it will suffice for us to refer to the well known authority A.G. of *Duchy of Lancaster v. L & NW Railway Co* [1892] 3 Ch. 274 in which it was held that the summary procedure under the English rule which identical to ours, can only be adopted when it can be clearly seen that a claim or answer is on E the face of it 'obviously unsustainable.

In *Attorney-General, Malaysia v. Chiow Thiam Guan* [1983] 1 CLJ 27; [1983] CLJ Rep 462 Hashim Yeop A Sani J (as he then was) expressed his finding as follows:

F

> The law to be applied is elementary and has been set out in a number of cases - see *Low Yat v. G.C. Grace* [1947] MLJ and *Mooney & Ors. v. Peat, Marwick, Michell & Co. & Anor* [1967] 1 MLJ 87. The principle which seems to have been established is that the Statement of Claim should be struck out only in plain G and obvious cases where the Judge can say at once that the Statement of Claim as it stands is insufficient even if proved to entitle the plaintiff to the relief. It follows that so long as the Statement of Claim discloses some ground of action the mere fact that the plaintiff is not likely to succeed is no ground to strike out the Statement of Claim.

H

[14] The principles enunciated in these cases point out to one unmistakable direction to be considered in an application of this nature ie, whether the claim by the plaintiff is groundless by any reason of flaw or fault in law or whether it is untenable because I the allegations contained in the statement of claim are so implausible and illogical as to disclose no cause of action.

[15] Bearing in mind the above stated principles, its prompts me to go through the pleadings and upon doing so, it is my finding that the plaintiffs' action on the breach of the agreement and/or the administrative arrangement is because of the slander. It is evident from paras. 8(a) and (b) of the statement of claim that the plaintiffs are alleging slanderous statements being made by the defendant. The plaintiffs' complaints are in respect of those slanderous statements. Paragraph 9 of the statement of claim again refer to the "said words", meaning the defamatory statements imputing the plaintiffs as criminals and as a result of which their character, credit and reputation have been brought into public scandal, odium and contempt (see para. 10 of the statement of claim). Paragraph 12 and the reliefs sought by the plaintiffs urges this court to restrain the defendant from further publishing the slanderous words against the plaintiffs. In this regard, it is my considered view that the plaintiffs' action is one based on defamation. The issue is purely whether those words published as stated in paras. 8(a) and (b) the statement of claim are defamatory. The alleged breach arises out of the publication of the slanderous statements.

[16] It is submitted by the learned Senior Federal Counsel that the words alleged against the plaintiffs are not defamatory. It states the truth, and I agree. It is a historical fact. The atrocities of the Parti Komunis Malaya is part and parcel of the history of this beloved nation of ours. The court is entitled to take judicial notice of this historical fact. Every responsible citizen of this country will know that, and know who the first plaintiff is and what he was and has done to the country. I cannot understand and it is certainly beyond my comprehension how the plaintiffs can claim that their character, credit and reputation has been brought into public scandal, odium and contempt. The publications made by the defendant are not defamatory to the plaintiffs. It is the truth. On the face of it, I find the plaintiffs claim is clearly unsustainable. It discloses no reasonable cause of action.

[17] I shall now consider the issue of the capacity of the plaintiffs to bring the action.

[18] The plaintiffs' pleading indicate that the first plaintiff is suing in his personal capacity as well as a representative of all members of the Parti Komunis Malaya and all the other relevant parties. It is unclear who these "other relevant parties" are. This is an unknown party. He is also suing in his capacity as the secretary general of the Parti Komunis Malaya.

[19] Lord Atkin in the House of Lords' case of *Knupffer v. London Express Newspaper Ltd* [1944] AC 116 at p. 122 remarked:

> The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfounded generalizations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be a facetious exaggeration. Even in such cases words may be used which enable the plaintiff to prove that the words complained of were intended to be published of each member of the group, or at any rate, of himself.

[20] In *Atip Ali v. Josephine Doris Nunis & Anor* [1986] 1 CLJ 320; [1986] CLJ Rep 283 Wan Yahya J after quoting *Knupffer v. London Express News paper Ltd (supra)* stated:

> Lastly, I am of the view that representative proceedings cannot be taken in defamation proceedings. No representative action is normally allowed to establish the right of numerous person to recover damages as the sole relief claimed. In a defamation suit the ground of liability for damages must necessarily differ from one person to another

[21] In the said case, His Lordship also referred to *Daya v. Param Sukh* [1888] 1 LR 11 All 104 and *Brahmana v. Ramakrishnama* [1894] 1 LR 18 Madras 250. Defamation involves a right in personam and close relationship with the person defamed alone will not give rise to the right on the part of other persons to sue the defendant.

[22] The first plaintiff's attempt of bringing this action as a representative of all members of the Parti Komunis Malaya and all other relevant parties is therefore misconceived.

[23] As to the locus of the second plaintiff suing as the Secretary General of Parti Komunis Malaya, it is trite that an unincorporated association such as the Parti Komunis Malaya must be clothed with authority before it can be considered as a body with legal personality capable of suing and to be sued in its own name either in contract or in tort, which includes of course, an action of defamation. Parti Komunis Malaya is an unlawful society. It is not a society registered under s. 7 of the Societies Act 1966. The second plaintiff can only sue in that capacity if and only if s. 9(c)

of the same Act has been complied with. There is no evidence to show that the second plaintiff has been so declared by the Registrar of Societies. In the circumstances, I hold that the second plaintiff lacks capacity. (See: *Chen Cheng & Anor v. Central Christian Church and Another Appeal* [1996] 1 SLR 313, *Electrical, Electronic, Telecommunication and Plumbing Union v. Times Newspapers Ltd & Others* [1980] 1 QB 585).

[24] For the reasons above stated, it is my conclusion that the statement of claim should be struck out. This is a plain and obvious case which I can say at once that the statement of claim as it stands is insufficient to entitle the plaintiffs to the reliefs claimed. The defendant's application in encl. 21 is hereby allowed in the terms of prayers (1) and (4).